United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

76-4054

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

RCA GLOBAL COMMUNICATIONS, INC.,

Petitioner,

—against—

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

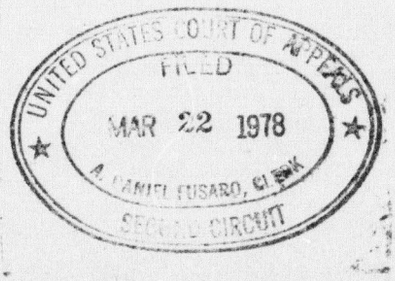
and

ITT WORLD COMMUNICATIONS INC.,
TRT TELECOMMUNICATIONS CORPORATION, and
WESTERN UNION INTERNATIONAL, INC.,

Intervenors.

ON PETITION FOR REVIEW OF REPORT, OPINIONS AND ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

SUPPLEMENTAL BRIEF AFTER REMAND OF INTERVENOR TRT TELECOMMUNICATIONS CORPORATION



E. EDWARD BRUCE
WILLIAM P. SKINNER
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
202—452-6000

Attorneys for
TRT Telecommunications Corporation

March 20, 1978

CASILLAS PRESS, INC.—1717 K Street, N.W.—Washington, D.C.—223-1220

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Administrative Decisions

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RCA GLOBAL COMMUNICATIONS, INC.,

Petitioner,

- against -

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

and

ITT WORLD COMMUNICATIONS INC.,
TRT TELECOMMUNICATIONS CORPORATION, and
WESTERN UNION INTERNATIONAL, INC.,

Intervenors.

SUPPLEMENTAL BRIEF AFTER REMAND OF
INTERVENOR TRT TELECOMMUNICATIONS CORPORATION

INTRODUCTION

This case comes before this Court pursuant to the Court's order retaining jurisdiction pending a remand of the proceedings to the Federal Communications Commission.[1/] The Commission adopted a final decision in the proceedings on remand which was released on January 6, 1978,[2/] and petitioner,

---

1/ This Court's prior opinions in this case are reported at 559 F.2d 881 (2d Cir. 1977) and 563 F.2d 1 (2d Cir. 1977). For the convenience of the Court these decisions have been reproduced in a Supplemental Joint Appendix (S.J.A.) and can be found at S.J.A. 935-45 and 946-48. Citations to the Joint Appendix filed with the Court during the earlier proceedings will refer to J.A.

2/ See Memorandum Opinion and Order (Remand Order), S.J.A. at 949.

RCA Global Communications, Inc. (RCA), thereafter filed with this Court a Supplemental Brief After Remand.

In its Supplemental Brief, RCA asks this Court to set aside and vacate orders of the Commission which have prescribed, pursuant to Section 222(e)(3) of the Communications Act, 47 U.S.C. § 222(e)(3), a new "international formula" for distributing unrouted international telegraph traffic between the various international record carriers (the "1976 formula"). RCA thereby seeks reinstatement of the international formula which was first prescribed by the Commission in 1943 (the "1943 formula"). TRT herein submits this brief to show that this Court should deny RCA's petition and affirm the decision of the Commission.

QUESTIONS PRESENTED

1. Whether, under the scope of review open to this Court, the Commission can properly be held to have erred in determining that the 1976 formula would better serve the public interest and would be more just, reasonable, and equitable than the 1943 formula?

2. Whether the procedures followed by the Commission upon remand from this Court were adequate?

COUNTERSTATEMENT OF THE CASE

Background. The facts underlying the Commission's approval first of the 1943 formula and its subsequent prescription

of the 1976 formula are by this time well known to this Court, in the light of its two prior opinions in this case.[3/] Suffice to reiterate here that the 1943 merger between Western Union Telegraph Co. ("Western Union") and Postal Telegraph, Inc., into a single monopoly-service domestic telegraph entity created a serious risk that the merged company would discriminate among the international record carriers ("IRCs") who were (and still are) dependent upon the domestic telegraph entity for the origination of many international telegrams. To insure that no such discrimination could occur, Congress by virtue of Section 222(e) of the Communications Act empowered the Commission either to approve a formula agreed upon by the carriers or to prescribe a different formula for the distribution of Western Union-originated international telegraph traffic.

The mechanics of the original 1943 formula, as well as its essential purpose of preserving pre-1943 market shares by "diminish[ing] . . . the incentive of the international carriers to expend effort and revenues in attempts to divert traffic from each other . . .,"[4/] have been described by TRT in its prior briefs in this case. By the same token, the disparity between the 1942 market shares, which set the basic parameters for the 1943 formula, and the market shares of the IRCs

---

3/ See also Western Union Int'l, Inc. v. FCC, 544 F.2d 87 (2d. Cir. 1976), discussing at length both the historical circumstances and legislative history underlying Section 222.

4/ See Separate Report of The Commission on Formulas For The Distribution of International Traffic, 10 F.C.C. 184, 191 (1943).

in the early 1970's, prior to the prescription of the 1976 formula, are also well known in this case.

Thus, even though TRT by the time of the 1974-75 Western Union traffic study, which underlies the Commission's orders here, had attained a routed message traffic market share of 5.55%, it received only 1.4% of unrouted traffic allocated by the 1943 formula. Similarly, ITT's routed market share was 33.68%, but it received only 11.4% of the unrouted traffic. These discrepancies were explained for the most part by the formula's award of a large surplus of traffic to RCA, whose routed market share had fallen to 33.12% by 1974, but whose formula share was 48.2%. Far from being anomalies in the operation of the 1943 formula, the TRT and ITT deficits and the RCA surplus were central to the very purpose of the 1943 formula, since it sought to freeze the status quo by taking traffic from those carriers who increased their post-1942 market shares and giving it to those carriers who dominated the market in 1942.

The Commission's Prior Orders and this Court's Prior Decisions. Acting upon a complaint filed by ITT, the Commission instituted proceedings to determine whether the 1943 formula should be modified. Following the receipt of five rounds of comments, as well as the specially commissioned Western Union traffic study, the Commission in January 1976 issued its initial decision.[5/] In this initial decision, the Commission

---

5/ Report and Order and Notice of Proposed Rulemaking, 57 F.C.C. 2d 190, (1976), S.J.A. 1121.

expressed its tentative preference for eventually requiring that all telegraph traffic be specifically routed by the sender, so as to avoid the need for a formula for distributing unrouted traffic.[6] Recognizing, however, that none of the parties had addressed the all-routed procedure, the Commission asked the parties to file comments upon it.

Moreover, also recognizing the pernicious effects of the 1943 formula -- which the Commission had found to be "inequitable as among the parties" and "against the public's interest in a strong, efficient public message [i.e. telegraph] service" (S.J.A. 1122, J.A.3) -- the Commission prescribed the 1976 formula as an "interim formula" to be employed pending final action on the all-routed plan. This 1976 formula distributes unrouted telegraph messages between the IRCs on the same basis as their proportionate share of routed traffic.

RCA sought judicial review in this Court of the Commission's January 1976 order, as well as a September 1976 order denying RCA's petition for reconsideration and stay of the earlier order. On July 29, 1977, this Court held that the Commission's decision to adopt the 1976 formula was premised upon its tentative preference for an all-routed solution -- a preference which was both unsupported by the administrative record and opposed by virtually all the carriers, including Western Union.[7] Accordingly, this Court granted RCA's petition

---

6/ Id. at 209, S.J.A. 1140.

7/ See 559 F.2d at 887-891, S.J.A. 941-945.

for review, vacated the Commission's January 1976 order, and remanded the case to the Commission for further proceedings in accordance with the Court's opinion.

The Commission, TRT and ITT promptly sought rehearing of the July 27 decision, arguing that the Court had not invalidated the Commission's disapproval of the 1943 formula and should not, therefore, have vacated the Commission's January 1976 order. It was also contended that the basic thrust of the Court's July 27 opinion was directed at the inadequacies of the all-routed scheme, rather than defects in the 1976 formula itself. Accordingly, rehearing was sought to allow the Commission the opportunity to determine whether the 1976 formula was sustainable on grounds unrelated to the all-routed procedure.

On October 5, 1977, this Court granted the petitions for rehearing.[8/] In so doing, the Court ordered a limited remand of the case to the Commission so that it could determine

> whether the promulgation of the 'interim' [1976] formula has, in the opinion of the FCC, a factual basis in the record independent of the FCC's tentative preference for an all-routed system. 9/

The Court expressly stated that interested parties could submit additional facts "by affidavits and/or written arguments."[10/] In view of the desirability of an early decision, the Court

---

8/ 563 F.2d 1-3, S.J.A. 946-48.

9/ 563 F.2d at 3, S.J.A. at 948.

10/ Id.

suggested that the Commission direct the parties to file comments within 30 days and that it reach a final decision within 60 days.

Commission Proceeding on Remand. In accordance with the Court's rehearing order and suggested schedule, the Commission solicited written comments from all interested parties. Without in any way challenging the procedures adopted by the Commission in this regard, RCA tendered written comments (S.J.A. 974-1008) which argued that the 1976 formula would impose "counterproductive sales and marketing expense" on the IRCs (Id. at 979), would lead to less than "efficient handling of traffic" (Id. at 986), would be based upon the theory that "'competition' [is] a desirable end in itself" (Id. at 989), and would "not [be] fair as between the carriers" (Id. at 992). Additionally, RCA complained of the revenue losses it would experience in shifting from a formula that guaranteed it nearly half of the unrouted traffic to one which allotted only its pro rata share of routed traffic. (Id. at 995). Finally, "without prejudice to [RCA's] basic position" (Id. at 996), it urged the Commission to "phase in" (Id. at 997) or otherwise limit (Id. at 999) or reduce the significance of (Id. at 1001) any routed-market-share approach to formula distribution of Western Union-originated traffic.

Athough running to more than 30 pages in length, RCA's comments called few new facts to the Commission's attention. RCA did state that it had assigned "a greater proportion

of" its sales representatives' time to the promotion of telegraph service -- i.e., an allocation of $670,000 for 1977, compared to $340,000 in 1976 (Id. at 982). (RCA did not, however, state that its total promotional expenditure had increased.) RCA additionally asserted that the introduction of the 1976 formula would result in over 50,000 more messages per year being dispatched over indirect circuits to foreign correspondents, resulting in asserted revenue losses to the U.S. industry of $130,000 (S.J.A. 987).[11/]

Western Union International, Inc. (WUI), filed brief comments with the Commission upon remand. (S.J.A. 1009-22). While devoted principally to arguments of law concerning the propriety of maintaining the 1943 formula, WUI attached an affidavit to its comments from its Vice President-Sales, who attested that

> Without qualification I can state that the intensity of competition in terms of selling and marketing activities and service offerings was no less under the original formula than they are under the interim [1976] formula in effect pursuant to the Commission's [January 1976 order].
> (Id. at 1019).

Thus, although supporting RCA in its attack upon the 1976 formula, WUI contradicted RCA's argument that the 1976 formula

---

11/ An "indirect" circuit is one established by an IRC with a foreign point via a transiting foreign administration. For example, TRT presently serves many African points and points in Asia via its direct circuit with Italy. By contrast, a "direct" circuit is one which avoids a transiting administration.

inevitably would lead to a substantial increase in the promotional efforts by the IRCs.

In its submission on remand, ITT World Communications Inc. (ITT), detailed a number of specific improvements which it had recently made to increase the efficiency and quality of transmission of its telegraph traffic. (See Affidavit of John B. McKinney (S.J.A. 1040-44)). ITT's affiant offered the opinion that the allocation of revenues and manpower entailed in these service improvements "might well have been channelled to other services for which a greater demand exists, and thus . . . may not have occurred as rapidly as they did," had it not been for the incentives provided by the 1976 formula. (Id. at 1041).

TRT's submission on remand rebutted the contentions made by RCA in this Court concerning the alleged impact of the 1976 formula upon the promotional and operational expenses of the IRCs. TRT pointed out that it had been able to handle all of the additional traffic made available to it under the 1976 formula with essentially no increased operational expense (S.J.A. 1073-74), and reaffirmed that the adoption of the 1976 formula had not "altered TRT's sales and marketing approach with respect to international cable traffic." (Id. at 1072). Additionally, TRT brought to light several other significant intervening facts bearing upon the prescription of the 1976 formula.

First, TRT pointed out that following the close of the traffic study underlying the Commission's January, 1976

order, TRT had been deprived of its 1943 formula quota for traffic to Columbia, thus limiting TRT to 1943 formula traffic to only the Bahamas and Belize (formerly British Honduras). TRT demonstrated that, were the 1943 formula to be resurrected, it would, therefore, be restricted to receiving formula traffic for only .005 (.5%) of all unrouted messages filed with Western Union during 1977. (S.J.A. at 1069).

TRT further demonstrated that this decline from its prior 1.4% share of the 1943 formula traffic came in the face of TRT's continuing growth in its market share for routed traffic. Thus, by the first six months of 1977, TRT had expanded its routed market share to 7.7%. (Id. at 1068-69). Accordingly, TRT showed that were the Commission to return to the 1943 formula, the disparity of TRT's formula and routed share would increase to the point where TRT would obtain only 1/15th as much formula traffic as routed traffic -- i.e. 0.5% divided by 7.7%. (Id. at 1068).

In addition to the factual developments concerning the impact of the international formula upon it, TRT called the Commission's attention to two actions taken by RCA on August 19, 1977 -- three weeks following the issuance of this Court's July 27 opinion and well before the Court's issuance of its October 5 opinion on rehearing. TRT pointed out that, on that day, RCA filed proposed tariffs substantially increasing the charges for RCA's telegraph traffic. TRT argued that RCA's application made

> so soon after its apparently successful efforts to force reinstatement of the 1943 formula raise[d] substantial questions as to whether RCA's efforts to increase international message rates [were] closely related to its preservation of the anticompetitive atmosphere fostered by the 1943 formula. (S.J.A. 1065)

TRT contended, therefore, that "RCA's own actions helped demonstrate the potential adverse impact of the 1943 anti-competitive formula on the maintenance of lower rates." (Id. at 1065-66).

TRT also pointed out that on the same day it sought to raise rates to the public, RCA filed a petition with the Commission asking that the IRCs be allowed to significantly expand their direct contact with filers of international message traffic. TRT noted that this proposal, if adopted, would give rise to "a strong potential for additional promotional activity by the IRCs directed at senders of international telegrams," notwithstanding the fact that RCA had, at that point, successfully attacked the Commission's January 1976 order on the very ground that it unduly enhanced such promotional activites. (Id. at 1070-71).[12/]

12/ Western Union also filed comments on remand in the form of a one-page letter (S.J.A. 1118) which reaffirmed Western Union's position that a formula, as opposed to an all-routed, mode of distributing international telegrams should be continued. Western Union stated that its computerized program for implementing the 1976 formula had "functioned extremely well" and involved "relatively minor (approximately $50,000 per year)" operating expenses.

The Commission's January 6, 1978 Order. Following receipt of the comments of the interested parties, the Commission issued its order on remand.

At the very outset of its order, the Commission addressed the merits of the all-routed procedure. Noting RCA, ITT and TRT's arguments that it would impose substantial additional costs upon the IRCs which would yield no real benefit to the public, as well as the evidence produced by Western Union that its implementation of the 1976 formula was "functioning smoothly" with "relatively minor operating expense," the Commission determined to abandon any further investigation of the all-routed system. Summing up its reasons for this action, the Commission stated

> [s]ince so many users are satisfied to place these messages with Western Union, we do not believe that an all routed formula would add significant public benefits, whereas it could add to customer costs and even disrupt convenient service through Western Union to which the public has become accustomed. (S.J.A. 951).

The Commission next turned to a discussion of the merits of the 1976 formula, considered apart from the now-abandoned all-routed distribution system. After setting forth the positions of the parties as expressed in their comments, the Commission first rejected the arguments advanced by RCA. While conceding that RCA may well have allocated a larger proportion of its marketing efforts to telegraph service in 1977 than 1976, the Commission stated that it was "plain [that] . . . no carrier, including RCA . . . plans to undertake" the multimillion

dollar promotional program which RCA claimed would arise out of the 1976 formula. (S.J.A. 958). The Commission also stated that it believed RCA's emphasis on advertising would "soon give rise to efforts, like those of ITT . . . to improve, where possible, the facilities underlying service to the public." (S.J.A. 958). In that regard, the Commission noted that, in contrast to the 1943 formula which did not in any way reward improvements in service or prices, the 1976 formula, focusing as it did on "customers [who] are keenly interested in the best service for the lowest cost," would provide incentives to the carriers "to provide the very best" service and prices, thus benefiting the public interest. (Id. at 959-60).

As to RCA's contention that the 1976 formula resulted in a diversion of traffic from direct to indirect circuits, the Commission noted that the 50,000 messages which RCA estimated were so diverted amounted to less than one half of one percent of the nearly eight million messages transmitted by the IRCs. (Id. at 959). The Commission found that such a "de minimis shift of traffic to indirect service is not in our opinion a threat to the public interest." (Id.)

Finally, in addressing RCA's arguments, the Commission determined that RCA had no legitimate "claim to a guaranteed amount of traffic" such as it obtained under the 1943 formula (Id. at 960), and noted that it could find "no indication by RCA that the quality of service it provides to the public would

suffer in any way by retention of the [1976] formula." (Id. at 961).[13/]

Turning to its affirmative findings, the Commission determined that the 1976 formula "has simplified the administration of routing allocations to the carriers and eliminated many of the sources of controversies found in the original formula." (Id. at 962). The Commission went on to find that the 1976 formula "provides each carrier with the same opportunity as every other carrier to share in the pool of unrouted overseas messages Western Union receives." (Id. at 963). Further, the Commission noted the "improvements already made by ITT . . . under the [1976] formula [were] of the type we anticipated the formula would inspire," stating the expectation, based upon "past experience in other areas," that "once the formula is accepted as the rule, such further improvements will soon be forthcoming from all the carriers," since "carriers competing in this fashion must out of self interest strive to improve service efficiency and to keep charges as low as possible." (Id. at 964). On this basis, the Commission found the 1976 formula to be "just, equitable, reasonable and in the public interest on its own merits." Accordingly, it determined that that formula was "in no way dependent for its justification

---

13/ The Commission also addressed RCA's proposed alternative methods for implementing a 1976-type formula, finding that they would "fail to serve the public interest as positively as the [1976] formula." (Id. at 961).

on a required routing of distributing international message telegraph traffic." (Id. at 964).[14/]

Thus, after an analysis of the arguments put forward by the carriers on remand and a discussion of the additional facts presented to it, the Commission affirmed that the 1976 formula was justified on its own, not as a stepping stone to an all-routed distribution of international telegraph traffic. It is this Commission order which RCA now seeks to overturn by the supplemental proceedings that it has initiated in this Court.

ARGUMENT

RCA's supplemental brief raises no significant issues of law concerning the Commission's decision to replace the 1943 formula with the 1976 formula. Thus, RCA does not contest the Commission's jurisdiction under Section 222(e) of the Communications Act to take this action. It now abandons any contentions that the Commission failed to make the statutory findings required of it under that section in striking down the old formula and replacing it with a new one (See RCA Sup. Br. 39). RCA does not argue that the Commission misinterpreted any legal principles bearing upon the exercise of its Section 222 jurisdiction. And finally, aside from a half-hearted argument which

---

14/ The Commission noted, however, that it would "continue to closely monitor the carriers' activities in the message telegraph service" so that it could, if necessary, modify the 1976 formula in the future as the public interest might require. (Id. at 964).

RCA did not advance below and which it makes at the tag-end of its brief here, it advances no serious attack upon the procedures employed below.

Having none of these traditional avenues of judicial review open to it, RCA is reduced to arguing that the Commission made a mistake when it determined that the "public interest" would be served by implementation of the 1976 formula and that such a formula would be "just, reasonable and equitable" within the meaning of Section 222. In short, RCA now seeks to have this Court make an independent and essentially de novo determination as to whether the Commission has properly perceived the implications of the formula which it has now prescribed for distributing Western Union-originated telegraph traffic.

In addressing RCA's argument, we note first, the "narrow scope afforded a court of appeals in reviewing the Commission's actions under the Federal Communications Act," Radio Relay Corp. v. FCC, 409 F.2d 322, 326 (2d Cir. 1969), when the only significant contention raised on appeal is whether the Commission has properly discerned the significance of the various competing considerations bearing upon its definition as to the requirements of the public interest in a particular case. As this Court has recognized,

> [i]n such cases [the court's] task is limited to determining 'whether the Commission has been guided by proper consideration bringing the deposit of its experience, the disciplined feel of the expert to bear'; that is, 'whether this Commission has fairly exercised

> its discretion within the vaguish, penumbral bounds expressed by the standard of 'public interest.' (Id.)

Indeed, in its prior decision in this case, this Court recognized that its

> responsibility is not to supplant the Commission's balance of . . . interests with one more nearly to its liking, but instead to assure itself that the Commission had given reasonable consideration to each of the pertinent factors. 559 F.2d 881, 890 (S.J.A. 944), quoting from Permean Basin Area Rate Cases, 390 U.S. 747, 792 (1968).

Of course, these principles do not mean that a court can shut its eyes to obvious flaws in an agency's articulation of the public interest. Thus, this Court's July 27 decision in this case rested on the determination that the Commission had justified its prescription of the 1976 formula upon its preference for an ultimate all-routed procedure, without making any findings under Section 222(e) as to whether the all-routed procedure was "just, reasonable, equitable and in the public interest." It was, of course, for this reason that this Court's rehearing order remanded this proceeding to the Commission, so that it could determine whether the 1976 formula could be justified on grounds independent of the all-routed approach.

In the proceedings on remand, the Commission took decisive action which wholly obviates the grounds for this Court's previously expressed concern that the 1976 formula was merely a way-station leading to an all-routed scheme. It abandoned any further pursuit of the all-routed procedure and concluded that the 1976 formula was "just, reasonable, equitable and in

the public interest" standing on its own. As we will now show, RCA has presented nothing to this Court which would justify its disturbance of this decision.15/

I. THE COMMISSION PROPERLY DETERMINED THAT THE 1976 FORMULA WOULD BETTER SERVE THE PUBLIC INTEREST AND WOULD BE MORE JUST, REASONABLE AND EQUITABLE THAN THE 1943 FORMULA

A. RCA's Arguments That The 1976 Formula Will Not Serve The Public Interest Are Without Merit.16/

1. Promotional Activities

In attacking the Commission's determination that the 1976 formula will serve the public interest, RCA identifies three alleged defects in the Commission's analysis. First among

---

15/ We do not think it necessary to debate RCA in this case as to whether the "substantial evidence" or "arbitrary and capricious" standard of review is applicable here. For even accepting RCA's view as to the appropriate standard of review here --

> "the object of review is to determine whether a reasoned conclusion from the record as a whole could support the premise on which the Commission's action rests" (RCA Sup. Br. 39n)--

it is clear that such a review of the record here must lead to an affirmance of the Commission's decision in this case.

16/ We note that RCA's argument of the first point in its brief is captioned in a way so as to distort the proper scope of review available to this Court in this case. Thus, RCA argues that "substantial evidence demonstrates that implementation of the interim formula has disserved the public interest." (RCA Sup. Br. 37). However, the inquiry open to this Court under the Administrative Procedure Act is not whether there is "substantial evidence" to sustain the point of view of a party who seeks to attack an agency's determination, but rather whether there is "substantial evidence" to sustain the agency.

them is RCA's claim that "comprehensive marketing efforts," which will allegedly be made by the IRCs once the 1976 formula is made final, "would run to millions of dollars per carrier" and thus would strongly disserve the interests of the IRCs' customers. (RCA Sup. Br. 41). The Commission thoroughly dealt with this contention during the proceedings on remand and determined that it was insubstantial. The record amply supports the Commission's determination in this regard.

In the January 1978 order, the Commission found that "no carrier including RCA . . . plans to undertake" a promotional program running into the millions of dollars of the sort which RCA claims might result from implementation of the 1976 formula. (S.J.A. 958). The Commission went on to state that it found "no indication in RCA'[s] . . . pleadings that it is considering increasing its solicitation expenditures to the scale it claims is necessary for nationwide coverage." (Id. 958).

These Commission findings are fully supported by the record. In the first place, RCA's own submission to the Commission on remand demonstrated that its "advertising" expenses with respect to the promotion of telegraph service were, even after implementation of the 1976 formula, only $45,000. (S.J.A. 985). The vast majority of the additional expenses, which RCA alleged it had allocated to telegraph service in the aftermath of the 1976 formula, were identified as non-advertising "marketing" costs (Id.), which represented only RCA's assignment of

"a greater proportion of [its sales representatives'] total time to the telegram service." (S.J.A. 982) Thus, RCA's actual out-of-pocket expenses associated with promoting telegraph service, as opposed to allocation of on-going marketing expense, were de minimis.

By the same token, RCA's own data show that of the alleged $2 million plus which RCA says will be necessary to develop a comprehensive marketing program, $947,000 represents "advertising" directed at the "social user" and another $240,000 represents "advertising" addressed to the "corporate user" (S.J.A. 985). Thus, RCA's projection of its promotional program rests upon the hypothesis that it would increase its advertising budget by more than 2700%, from its current $45,000 to a projected $1,232,000. (Id.)

The Commission quite properly found that there was no serious prospect that RCA would so increase its advertising efforts. Indeed, RCA itself in its supplemental brief to this Court admits as much, when it quite candidly states that the promotional program which it described in the submissions to the Commission below on remand would be "far out of proportion to any conceivable market results." (RCA Sup. Br. 24). Thus, RCA admits that the effort described in that submission "has not yet been made" and that the study submitted to the Commission "was presented principally to establish the basic fallacy of the FCC's all-routed preference (now abandoned) and show that there was no reasonable way to reach the entire American market without extravagant and pointless expense." (Id.)

The submissions made by the other IRCs further support the Commission's findings with respect to this issue. As noted above (p. 10), WUI filed an affidavit executed by its Vice President-Sales attesting to the fact that competitive efforts under the 1943 formula were just as intensive as those under the 1976 formula. By the same token, TRT furnished an affidavit stating that the adoption of the 1976 formula "has not altered TRT's sales and marketing approach with respect to international cable traffic." (S.J.A. 1082; see also id. at 1071-72.) And while ITT did not set forth any specifics in connection with its promotinal expenditures since the adoption of the 1976 formula,[17/] the facts recited by RCA in its own brief reflecting ITT's loss of market share for routed traffic from 34% to 29% (RCA Sup. Br. 30-31) strongly indicate that ITT did not engage in a sustained program of promotion for its telegram services.

Thus, in the light of RCA's own comments to the Commission and of the position taken by the other IRCs, there is

---

17/ Relying upon ancient common law authorities (RCA Sup. Br. 40n.), RCA seeks to have this Court draw a binding inference concerning ITT's promotional expenditures from the fact that ITT made no specific representations to the Commission concerning those expenditures. (Inexplicably, RCA makes the same argument as to TRT, notwithstanding its specific showing below that the 1976 formula had no impact on TRT's promotional strategy.) But, of course, regulatory agencies, like the Commission exercising its Section 222(e) justification, are not bound by rigid rules of evidence. See, e.g., Davis, Administrative Law Treatise § 14.05 (1958). A fortiori, the Administrative Procedure Act does not permit courts to rely on common law principles in reviewing agency action.

substantial, indeed compelling, evidence to support the Commission's rejection of RCA's contention that the 1976 formula would precipitate a multimillion dollar promotional spending spree by the IRCs.

2. Direct/Indirect Circuit Routings

The second ground that RCA relies upon in attacking the Commission's public interest determination rests upon its assertion that there will be an annual diversion of 5 ,000 unrouted telegrams from direct to indirect circuits. It is clear that the Commission properly refused to condemn the 1976 formula on this ground.

First, we note that RCA took a far different position on this issue in the comments which it filed prior to the Commission's January 1976 order. At that time, responding to an ITT proposal which would have allocated traffic solely to carriers serving foreign points via direct circuits, RCA described direct circuit routing as

> unworkable since it does not consider that many countries are not served by direct circuits and fails to adequately define a direct circuit. (J.A. 511-13).

RCA went on to further detail why limiting routing to direct circuits was "unworkable":

> [O]ver 103 destinations, to which 43,087 messages were sent during the 13-week study, are not served directly. Thus, for these countries, the ITT proposal would not provide a method of distribution for the 173,011 unrouted messages annually available. (J.A. 513).

The Commission in its January 1976 order rejected the ITT proposal concerning direct circuit allocation and agreed that RCA had properly perceived defects in it. (S.J.A. 1142, J.A. 29). We submit that RCA cannot now properly criticize the Commission for not restricting allocations to direct circuits.

Wholly without regard to RCA's inconsistency, there are other grounds for rejecting its contentions as to the direct/indirect circuit issue. In its January 1976 order, the Commission took "exception to the philosophy" underlying the contention that routings should be limited to direct circuits. As the Commission held

> [t]he effect of this [direct circuit allocation] proposal would be to deny small carriers, such as TRT or FTC [French Telegraph Cable Company] significant unrouted traffic, since those carriers serve a higher percentage of their service points through intermediate connections. We cannot find a justification in the public interest to so limit competition in this area. Since all carriers compete for traffic irrespective of routing, the only appropriate criteria are whether a carrier tariffs a destination point -- since the carrier may tariff only those points which it is authorized to serve --and whether a carrier handles routed traffic to a point.
>
> * * * * * *
>
> In this way, distribution can be updated to keep it in touch with changing circumstances. (S.J.A. 1142, J.A. 29).

Finally, in its order on remand, the Commission noted that the 50,000 messages which RCA now alleges will be "diverted" to indirect circuits represented only a "de minimis" proportion of the nearly 8 million world-wide messages annually

transmitted by the IRCs and thus did not constitute a "threat to the public interest." (S.J.A. 959).[18/] In the light of the Commission's familiarity with the technical aspects of routing international telegraph traffic over indirect circuits, its determination that the "diversion" of 50,000 messages per year to such circuits will not in any way impair the public interest is entitled to deference by this Court, absent a specific showing by RCA to the contrary. Having made no such showing here, RCA's argument on this point should be rejected.

3. Competition

Lastly, in attacking the Commission's public interest determination, RCA argues that the Commission simply equated "more competition" with the "public interest" and argues that if there is such a relationship it must be explicitly demonstrated by a factual record before the Commission. (RCA Sup. Br. 44). RCA's argument on this point is wrong on three different levels.

First, there is a significant difference in agency action which is designed to simply foster more competition and agency action, such as the Commission's disapproval of the 1943 formula, which removes artificial restraints on competition. Such latter action by an agency is, standing alone, in the

---

18/ Even RCA is compelled to admit that the direct/indirect circuit issue is of "relatively modest magnitude." (RCA Sup. Br. 40).

public interest unless the parties supporting the anticompetitive restraint can bring forward, as no party has done here, specific reasons for its continuation.

We begin with the proposition that TRT articulated in its earlier brief in this case, which no party has ever challenged, that a device, such as the 1943 formula, which systematically retards new competition and entrenches the position of dominant forces in the market, would ordinarily constitute a per se violation of the Sherman Act. See, e.g. United States v. Topco Associates, Inc., 405 U.S. 596 (1972); United States v. Sealy, Inc., 388 U.S. 350 (1967); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

The substitution of the 1976 formula for the patently cartel-like and anticompetitive 1943 formula, standing alone, serves the public interest. FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968).

In the Aktiebolaget case, the Federal Maritime Commission struck down two anticompetitive practices of steamship conferences regulated by it under a statute similar to Section 222 of the Communications Act. Specifically, Section 15 of the Shipping Act of 1916, 39 Stat. 728, empowered the FMC to disapprove cooperative agreements entered into by common carriers regulated by it, if it found them to be

> unjustly discriminatory or unfair as between carriers . . . or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter . . .. (390 U.S. at 240).

In exercising its jurisdiction under this statute, the FMC explicitly relied on antitrust policy and held that the anticompetitive restraints embodied in the two conference rules before it would be approved only if facts were brought forth to demonstrate that the rules were required by a serious transportation need, were necessary to secure important public benefits or otherwise were in furtherence of a valid regulatory purpose of the Shipping Act. 390 U.S. at 243. In unanimously upholding the FMC, the Supreme Court adopted a rationale which is directly applicable here:

> By its very nature an illegal restraint of trade is in some ways 'contrary to the public interest,' and the Commission's antitrust standard, involving an assessment of the necessity for this restraint in terms of legitimate commercial objectives, simply gives understandable content to the broad statutory concept of 'the public interest.' (390 U.S. at 244). 19/

Cases like FCC v. RCA Communications, 346 U.S. 86 (1953), and Hawaiian Tel. Co. v. FCC, 498 F.2d 771 (D.C.Cir. 1974), which deal with Section 214 of the Act, do not detract from the Commission's authority under Section 222 to place decisive weight upon the competitive aspects of the international formula. Section 214 embodies the premise that unlimited entry

---

19/ The principle of FMC v. Akteibolaget Svenska Amerika Linien, has often been followed by courts reviewing Commission orders in cases involving the removal of restrictive practices of common carriers. See e.g. National Ass'n of Reg. Utility Comm'rs v. FCC, 525 F.2d 630, 636, 639 (D.C. Cir. 1976); General Telephone Co. of the Southwest v. United States, 449 F.2d 846, 858 (5th Cir. 1971).

by carriers into new markets may not necessarily serve the public interest or the public convenience and necessity. Accordingly, the Commission is vested with the responsibility under Section 214 to assure the feasibility of additional competition in a particular market prior to authorizing a competitor to enter that market. Relying, as the Commission did in the RCA Communications and Hawaiian Tel. cases, upon nothing more than a bare, unexamined preference for competition as a justification for allowing new market entry is to fundamentally disregard the purposes of Section 214 and to default on its responsibility to assess the parameters of a market before authorizing a new entrant.

The Commission's determinations under Section 222, which involve the competitive consequences of practices engaged in by carriers who have already been authorized to enter a market, raise issues far different than those presented under Section 214. The terms, structure and legislative history of Section 222 demonstrate quite clearly that it was designed principally to ensure that the monopoly power which Western Union was gaining by virtue of its merger with Postal Telegraph in 1943 could not be misused by Western Union in its transfer of unrouted traffic to the international record carriers. There is nothing in this basic purpose, nor is there anything in the language of Section 222, which supports the idea that it was designed to repress fair competition among international carriers.

The second basic error with respect to RCA's posture that competition must be specifically proved to relate to the

public interest can be demonstrated even under standards imposed by the cases decided under the Commission's Section 214 jurisdiction. As the Supreme Court held in the RCA Communications case, it is proper for the Commission to rely on the general benefits of competition even when exercising its Section 214 jurisdiction and it need not require the specific showing demanded by RCA here:

> [The Commission] is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure. 346 U.S. at 96 (citation omitted).

The Court went on to explain the reason for this analysis:

> In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast, but the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it. 346 U.S. at 96-97. (Citation omitted.)

Here, the Commission has done much more than merely "warrant" the relationship between competition and the public interest.

This leads us to the third error permeating RCA's argument with respect to the competition issue. For the Commission did, indeed, have specific facts before it which provided ample support for its conclusion that the added incentives provided by the 1976 formula would promote competition in a way which would benefit the public.

With respect to the positive impact of the 1976 formula, the Commission had before it the specific demonstration of ITT concerning the manner in which service enhancements were adopted pursuant to a time schedule and a commitment of resources that might well not have been followed, but for the added incentives provided by the 1976 formula. The Commission also had before it facts showing the negative implications of the 1943 formula -- i.e. that within only three weeks of this Court's July 27 decision apparently invalidating the 1976 formula RCA had filed a tariff request for a substantial upward revision in message rates. Thus, the Commission properly determined that the substitution of the 1976 formula for the 1943 formula would promote competition in a manner which would serve the public interest.

B. The Commission Properly Determined that the 1976 Formula is Just, Reasonable, and Equitable as Among the IRCs.

In advancing the claim that the Commission has failed to justify the equity or fairness of its prescription of the 1976 formula, RCA relies upon the fact that in 1943 the Commission sanctioned a different formula and contends that the Commission has a special, indeed nearly insuperable, burden of justifying any deviation from that original 1943 formula. RCA's attack upon the Commission's order in this regard ignores established precepts of administrative law, as well as specific holdings by courts construing statutes, like Section 222(e), which deal with the justness, reasonableness and equity of divisions between carriers.

The fact that the Commission 35 years ago sanctioned a formula which is different than the one the Commission has now found to be in the public interest in no way detracts from the deference which this Court owes to the Commission's decision. As the Supreme Court has held:

> [F]lexibility and adaptability to changing needs . . . is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

American Trucking Ass'n v. Atchison T. & S.F. R. Co., 387 U.S. 397, 416 (1967). Indeed, within the past two months the Supreme Court reaffirmed these principles pursuant to a rationale that is directly applicable here:

> An administrative agency is not disqualified from changing its mind; when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue de novo and without regard to the administrative understanding of the statutes.

NLRB v. Iron Workers Local No. 103, ___ U.S. ___, 98 S.Ct. 651, 660-61 (January 17, 1978).20/

20/ The principles recognized in these administrative law cases are similar to the principles that have always governed the exercise by courts of their own equitable jurisdiction. See United States v. Swift & Co., 286 U.S. 106, 114-15 (1932); Milk Wagon Driver's Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 298-99 (1941); United States v. United Shoe Machinery Corp., 391 U.S.

(footnote cont'd)

Cases such as Office of Communications v. FCC, 560 F.2d 529 (2d. Cir. 1977), (See RCA Sup. Br. 46-47) are of no aid to RCA here. In that case, the FCC pursuant to an informal rule-making changed its policy with respect to the scope of the equal employment opportunity rules which govern FCC licensees, without establishing any factual record to justify or to explain this change of policy. In the present case, the Commission has issued three separate decisions. It received five rounds of comments prior to the issuance of its January 1976 order. It arranged for a special traffic study to determine the operation of the international formula. And finally, it entertained two further rounds of comments from the parties -- the first pursuant to RCA's request for stay and rehearing of the January 1976 order, the second pursuant to this Court's remand order. Under these circumstances, RCA's claim that the Commission has not sufficiently explained nor explored the reasons for its determination to replace the 1943 formula with the 1976 formula borders on the frivolous.

It is similarly clear that RCA's argument ignores relevant authority construing the term "just, reasonable and equitable" in regulatory contexts similar to Section 222(e) of the Communications Act. Although we are not aware of any cases interpreting the meaning of this phrase under the Communications

---

(footnote cont'd)

244, 248 (1968); Consolidated Edison Co. of New York v. FPC, 511 F.2d 372, 378 (D.C. Cir. 1974), all of which recognize that courts have the discretion, and in some instances the obligation, to modify or amend their orders in the light of changed circumstances.

Act in a context analogous to this case, it has been interpreted in an analogous setting under the Interstate Commerce Act in cases involving the division of revenues between carriers providing a through service.[21/] In that context, the Supreme Court has held that the purpose of the standard is "to empower and require the Commission to make divisions that colloquially may be said to be fair." Baltimore & Ohio R.R.Co. v. United States, 298 U.S. 349, 357 (1936), quoted with approval in Chicago & North Western Ry. Co. v. Atcheson, Topeka & Santa Fe Ry.Co., 387 U.S. 326, 345 (1967).

RCA's argument that the Commission has not shown that the 1976 formula is "just, reasonable and equitable" because it has not shown that RCA "abused or misused" the dominant position given to it by the 1943 formula (RCA Sup. Br. 46) or because it has failed to make other specific findings is inconsistent with these cases:

> there is no single test by which 'just', 'reasonable' or 'equitable' divisions may be ascertained; no fact or group of facts may be used generally as a measure by which to determine what division will conform to these standards. Considerations that reasonably guide to decision in one case may rightly be deemed to have little or no bearing in other cases.

21/ See 49 U.S.C. § 15(6) (railroad carriers); § 316(f) (motor vehicle passenger carriers); § 907(e) (water carriers); § 1009 (freight forwarders); § 1374 (airlines); and § 1483(b) (air carriers and other common carriers).

Baltimore & Ohio R.R. v. United States, supra, 298 U.S. at 349. And certainly the fact that RCA will receive less traffic under the 1976 formula than it did under the negotiated terms of the 1943 formula is of no significance here:

> The Act does not give any carrier a vested right to divisions that it may have negotiated. It does not recognize prescriptive privileges, but requires the Commission to establish 'just, reasonable, and equitable divisions.' The mere fact that the divisions may have caused a net reduction in the revenues of two . . . carriers while raising those of other . . . carriers does not establish the invalidity of the new divisions.

Chicago & North Western Ry. Co. v. Atcheson, Topeka & Santa Fe Ry. Co., supra, 387 U.S. at 326. See also American Airlines v. CAB, 495 F.2d 1010, 1023 (D.C.Cir. 1974). This Court, in this very case, recognized these principles when it held that the 1943 formula

> cannot be stretched to giving RCA a right in perpetuity to a fixed share of the telegraphic market regardless of changing conditions and circumstances . . .. [T]he 1943 formula did not create a contract in perpetuity apportioning revenues and did not relieve the FCC of its statutory duty to prescribe a "just, reasonable, equitable, and in the public interest" formula. 563 F.2d at 2, S.J.A. 947.

The Commission's determination that the 1976 formula is "just, reasonable and equitable" is more than adequately supported by the record. The 1976 formula "provides each carrier with the same opportunity as every other carrier to share in the pool of unrouted overseas messages Western Union receives." (S.J.A. 963). By contrast, the 1943 formula discriminated against carriers which had not served particular parts of the world in 1942 by

forever denying them any share in unrouted traffic directed to those areas. In addition, the 1943 formula attempted to freeze historical market shares and thus inhibited the growth of smaller carriers. The unfairness of the 1943 formula is vividly illustrated by TRT's experience. In 1943, TRT was a small carrier whose service was confined essentially to Central America. Today, TRT serves nearly all of the world and has been able to attract a growing share of the routed telegraph market as a result of its innovative marketing techniques and service oriented approach to the international record carrier business. The 1943 formula, however, precluded TRT from ever sharing in any unrouted telegraph traffic to areas of the world that it had not served in 1943 and severely curtailed TRT's share of unrouted traffic, even to its historic service area, in an effort to reduce the effect of its successful marketing efforts in that area.22/

The substitution of a formula which provides carriers an equal opportunity to compete for a formula which discriminated against carriers on the basis of past circumstances is consistent with the principle of equal treatment and nondiscrimination that, although addressed to the relationship between carriers and their customers, lies at the heart of common carrier legislation. As the Supreme Court noted in Texas & P. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 439 (1907):

22/ See pp. 9-10, supra.

> That the [Interstate Commerce Act] was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act.

This same concept of nondiscrimination and equal treatment, of course, applies to carriers regulated under the Communications Act. See American Trucking Ass'n, Inc. v. FCC, 377 F.2d 121, 130 (D.C. Cir. 1966), cert. denied, 386 U.S. 943 (1967); American Telephone & Telegraph Co. v. FCC, 449 F.2d 439 (2d. Cir. 1971).

A formula which allows each carrier an equal opportunity to compete for a share of the unrouted telegraph traffic is thus clearly a formula which "colloquially may be said to be fair" within the meaning of the Baltimore & Ohio R.R. and Chicago & North Western Ry. Co. cases. As this Court observed in its prior decision in this case, the 1976 formula can be sustained, wholly apart from its "public interest" effects, on the basis that it is more "just, reasonable, and equitable" than the 1943 formula. (563 F.2d at 2-3, S.J.A. at 947-48).[23/]

23/ In Point III of its brief, RCA relies upon an argument which it raised in its earlier briefs and which it concedes this Court rejected -- i.e. that the Commission improperly condemned the 1943 formula. Since we have shown in Part I that there was substantial evidence to support the Commission's decision to replace the 1943 formula with the 1976 formula, TRT does not believe it necessary to prolong this brief with a separate discussion of this aspect of RCA's argument.

II. THE HEARING PROCEDURES FOLLOWED BY THE COMMISSION ON REMAND WERE ADEQUATE

In making a limited remand of this case to the Commission, this Court expressly stated that the parties would be able to submit additional facts and arguments to the FCC by affidavits and written arguments. The Court suggested that these written materials be submitted to the Commission within 30 days and that the Commission enter a final decision with 60 days of the Court's order. (563 F.2d at 3, S.J.A. 948.)

Acting immediately upon the Court's suggestion, the Commission directed the parties to submit comments within 30 days of the remand order. (S.J.A. 972.) All of the interested parties filed and served comments and none objected to the procedure suggested by the Court and thereafter directed by the Commission. At no time did RCA or any other party object to this procedure or suggest the need for discovery, testimonial hearings or further written comments. The Commission adopted its decision on remand within the 60 days suggested by this Court, although it required additional time to publish that decision.

RCA now argues in its brief to this Court that the Commission's hearing procedures were inadequate and that RCA should have been given an opportunity to "ventilate" certain issues by

cross-examination or interrogatories.[24] RCA Brief at 53. This argument is essentially a rehash of the arguments which RCA made, and which this Court properly rejected, during the earlier stages of this proceeding. (559 F.2d at 885-87, S.J.A. 939-41.) Moreover, RCA's argument suffers from the further fatal defect that RCA never challenged the procedures followed by the Commission on remand.[25]

24/ We are also compelled to note RCA's not so subtle innuendos that the Commission's timely issuance of a final decision in accordance with this Court's suggested schedule on remand demonstrated a pre-existing commitment by the Commission to the 1976 formula, wholly without regard to the relevant facts or law. See e.g. the reference to the Commission's "rush to reaffirm its earlier rulings." (RCA Sup. Br. 46). If RCA felt that this Court suggested an unduly expeditious schedule for the proceedings on remand, it should have so advised this Court, rather than berating the Commission for compliance with that schedule.

25/ In its opening brief in these proceedings, ITT cited copious authorities holding that the failure to object to procedures followed by an agency bars a party from challenging those procedures on appeal of the agency's action. (ITT Br. 20 n.20).

CONCLUSION

For all of the reasons set forth above, the Commission's orders of January 7, 1976; September 27, 1976; and January 6, 1978 should be affirmed.

Respectfully submitted,

E. Edward Bruce
William P. Skinner
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

(202) 452-6000

Attorneys for
TRT Telecommunications Corporation

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RCA GLOBAL COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA

Respondents,

and

ITT WORLD COMMUNICATIONS INC.,
TRT TELECOMMUNICATIONS CORPORATION, and
WESTERN UNION INTERNATIONAL, INC.,

Intervenors.

CERTIFICATE OF SERVICE

I, E. Edward Bruce, a member of the bar of this Court, hereby certify that the foregoing brief was served this 20th day of March, 1978, by United States mail, postage prepaid, to the following persons:

Jack David Smith, Esq.
Federal Communications Commission
1919 M. Street, Northwest
Washington, D.C.20554

H. Richard Schumacher, Esq.
Cahill, Gordon & Reindel
80 Pine Street
New York, New York 10004

Grant Lewis, Esq.
LeBoeuf, Lamb, Leiby & MacRae
140 Broadway
New York, New York

Alvin K. Hellerstein, Esq.
Stroock & Stroock & Lavan
61 Broadway
New York, New York

Andrea Limmer, Esq.
U.S. Department of Justice
Washington, D.C. 20530

E. Edward Bruce

E. Edward Bruce